https://doi.org/10.25143/socr.20.2021.2.075-083

Problems of Recognition of Foreign Judgments and *res judicata* in European Union

Mykolas Kirkutis
ORCID: 0000-0001-6317-177X
Private law institute, Mykolas Romeris University, Lithuania
mykolas.kirkutis@icloud.com

Vigintas Višinskis
ORCID: 0000-0002-7846-2016
Private law institute, Mykolas Romeris University, Lithuania
vigvis@gmail.com

Abstract

The article examines the problematic aspects of recognition and enforcement of foreign judgments in the European Union in relation to the application of the public policy clause. Analysis of the content of public order also constitutes part of the article. It focuses on the EU law instruments which provide unequal conditions for non-recognition of foreign judgments. The authors discuss if inclusion in the CJEU of the limits on the interpretation of the public order clause is a sufficient guarantee to ensure proper application of the public order clause. Moreover, the authors analyse the principle of *res judicata* according the EU law.

Keywords: recognition of foreign judgments, public order, *res judicata*, European Union law.

Free Movement of Judgments and Public Order Exception

The growing number of disputes with an international dimension causes a need in the European Union (thereinafter – EU) to ensure an effective protection of the civil rights. One of the preconditions for achieving this goal is simplification of the enforcement of judgments of the courts of the Member States of the EU in civil matters throughout the Union. To achieve this goal, the EU legislation in civil (commercial) cases has abolished exequatur (the requirement to recognise a judgment before it is enforced) and enshrined the principle of free movement of judgments.

The exercise of the right to a judicial remedy is not limited to adoption of a judgment as a single final act on the substance of the dispute. Implementation of the right to judicial protection and effective protection of subjective rights of persons or interests protected by law depend on enforcement of court decisions (Tamošiūnienė, 2007). In 1997, the European Court of Human Rights (thereinafter – ECHR) ruled in case *Hornsby vs Greece* that a judgment given by any court must be enforced and that enforcement proceedings must therefore be regarded as an integral part of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention). In the context of the objectives of Article 6 of the Convention, if domestic law did not ensure the enforcement of court decisions, then the right to a fair trial would be illusory [4].

Judicial cooperation developed by the EU in civil matters is based on the principle of mutual recognition of judicial and extrajudicial decisions[1]. The first ideas of the free movement of judgments in the EU can be traced back to the treaty establishing the European Economic Community (also known as the Treaty of Rome)[2].

For implementation of Article 220 of the Treaty of Rome on simplification of formalities for recognition and enforcement of judgments and arbitration awards between Member States, the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters was adopted[3]. Article 26 (1) of that convention provided that a judgment given in a Contracting State is to be recognised in other Contracting States without any special procedure being required, but such judgment is to be enforced only at the request of the person concerned.

Although effective implementation of the principle of free movement of judgments has been identified as one of the basic preconditions for the creation of a common and efficient market since establishment of the European Economic Community, Article 27 of the Brussels Convention provided exceptions of this principle. One of the exceptions provided for in that convention was the ground for refusal to recognise a judgment given in a Member State if such recognition would be contrary to public policy in the Contracting State in which recognition is sought[4].

It is generally accepted that a court decision is one of the expressions of the state power. Therefore, its power is normally limited to the territory of the State in which the decision was rendered (Rijavec et al., 2018). However, the socio-economic situation obliges states to respect foreign judgments, but even in the twenty-first century the enforcement of a foreign judgment is still considered an interference with the sovereignty of another state (Rijavec et al., 2018, Jokubauskas et al., 2020). Moreover, the exception of

[1] Article 81 of the Treaty on European Union, OJ C 202, 2016, 13–46.

[2] Article 220 of the Treaty of Rome provides that Member States will, where necessary, negotiate among themselves in the interests of their nationals with a view to simplifying formalities for mutual recognition and enforcement of judgments and arbitration awards.

[3] Preamble to the Brussels Convention (1968).

[4] Article 27 (1) of the Brussels Convention (1968).

public order seeks to ensure protection of state sovereignty and constitutional order of each state. However, at both theoretical and practical levels, application of this clause to this day raises various issues.

Historically, a number of doubts have been expressed about this clause during the discussion of the draft Brussels Convention. It has been criticised as being contrary to the principle of free movement of judgments within the European Economic Community (Kaye, 1987). Critics feared that it would allow states to abuse its application, thus defeating the main aim of the convention, which was to create a European market based on mutual trust between Member States (Minehan, 1996). However, proponents of this clause considered these fears exaggerated and unfounded due to the limited practical application of this clause (Minehan, 1996).

Despite criticisms mentioned, public order has remained a condition for non-recognition of judgments in modern European Union law on the recognition and enforcement of judgments in civil matters. For example, Article 45 (1) (a) of the Brussels Ia Regulation provides that at the request of any interested party, a judgment shall not be recognised if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed. An essentially analogous public policy clause is contained in Article 22 (a) of the Brussels IIa Regulation, Article 40 (a) of the Succession Regulation, Article 24 (a) of the Maintenance Regulation and Article 34 (2) of the European Account Preservation Procedure Regulation.

However, Article 23 (a) of the Brussels IIa Regulation provides that a judgment relating to parental responsibility shall not be recognised if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought considering the best interests of the child. In assessing this provision of this regulation, the question arises as to how the balance between public policy and the best interests of the child should be reconciled; where the balance between these two interests lies.

The ECHR in case *Karrer vs Romania* found that in the sensitive area of family relations, the State is not only bound to refrain from taking measures which would hinder the effective enjoyment of family life, but, depending on the circumstances of each case, should take positive action in order to ensure the effective exercise of such rights [5]. In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order was struck within the margin of appreciation afforded to States in such matters, bearing in mind, however, that the child's best interests must be the primary consideration [3].

The public policy clause is also enshrined in Article 33 of the Insolvency Regulation, according to which any Member State may refuse to recognise insolvency proceedings instituted in another Member State or to enforce a judgment given in such proceedings if such recognition or enforcement would be manifestly contrary to public policy, in particular its fundamental principles, or constitutional rights and freedoms of the individual. Unlike other regulations mentioned above, the public policy clause is the only ground for non-recognition of judgments in insolvency proceedings.

The application of this clause in the Insolvency Regulation is linked to a *manifest* breach of public policy. Taking into account that the public order clause is the only non-recognition clause in the Insolvency Regulation, the authors consider that the requested state may refuse to recognise a decision that is manifestly contrary to public policy, especially when its effect is to restrict fundamental rights and freedoms, or on the grounds of public policy where the principles of due process have been breached (for example, breach of defense rights and the principle of *audi alteram partem*; impartiality of the court).

It should be noted that not all EU legislative initiatives in civil matters include a public order as non-recognition and non-enforcement clause. Such legislation includes the European Order for Payment Regulation and the Small Claims Procedure Regulation. Both of these EU regulations govern summary civil proceedings, and the aim of these initiatives is to speed up recovery of outstanding debts in the EU.

The question therefore arises as to whether the public policy clause on recognition and enforcement of judgments is losing its meaning and the Member States are moving towards full mutual trust. On the contrary, the question is whether this indicates a different level of mutual trust between Member States in certain areas. In the opinion of authors, absence of a public order clause in these regulations could have been due to two aspects. First, for example, the European Account Preservation Order establishes a procedural instrument to enforce a future decision. Secondly, the Small Claims Procedure Regulation introduces a simplified procedure for the recovery of debts up to EUR 5000. Such a limited nature of the application of that regulation may have undermined the confidence of the Member States in the area.

Interpretation and Application of the Public Order Clause

The public policy clause undoubtedly concerns the fundamental rights and freedoms of the European Union, as well as economic relations. According to the European Commission, rapid debt recovery is essential for economic operators in the European Union and for proper functioning of the internal market[5]. Since the application of the public policy clause directly determines enforcement of a judgment given in another Member State, its autonomous application and interpretation in the Member States also affects proper functioning of the internal market of the European Union.

Public policy is one of the grounds for non-recognition of a foreign judgment, which must be interpreted narrowly. Such an interpretation of public order determines that although the decision of a foreign court does not comply with the legal regulation of the Republic of Lithuania, it is not a ground for applying this clause in itself (Kirkutis et al., 2020).

[5] See https://ec.europa.eu/commission/presscorner/detail/en/PRES_05_296.

Although the public order clause has been laid down in various legislations of the European Union, the concept of this clause and its content are not disclosed in any of them. The question of the content of public order was first referred to the Court of Justice of the European Union (CJEU) in 1974 in *Yvonne Van Duyn vs Home Office*, where the Court took the traditional view that public policy is a national concept (i.e. the specific public policy of each Member State), which may change over time [2]. The CJEU has held a broadly similar position in subsequent cases; however, in subsequent case law has narrowed autonomy of Member States in interpreting and applying the public policy clause, stating that Member States are free to determine the content of the concept of public policy [1].

Thus, the abstract and unclear content and concept of the public policy clause raises problematic issues at both practical and doctrinal levels regarding proper implementation of this clause, compatibility with the principle of free movement of decisions in the European Union, and protection of state sovereignty and constitutional order.

Recognition of a foreign judgment is a judicial process in which provisions of the Convention shall also apply. Although the Convention does not establish specific criteria and requirements for recognition of foreign judgments, guidelines on application of certain public policy clauses are set out in the case law of the ECHR. For example, in case *Négrépontis-Giannisis vs Greece*, the court recognised the obligation to recognise a foreign judgment (family law) in accordance with Article 6 (1) of the Convention. This case concerned an illegal refusal by the Greek authorities to recognise a foreign judgment, provided that in order to recognise and enforce a foreign judgment under the Greek law several conditions had to be laid down. One of these conditions was that a foreigner judgment cannot infringe Greek public order. The ECHR ruled that the concept of public policy cannot be interpreted unlawfully and disproportionately (fr. *manière arbitration and disproportion*) [6]. Thus, the application of a public order clause cannot be disproportionate and infringe the right of individuals to recognise a foreign judgment.

Lithuanian case law recognises that a provision of public order may be invoked when recognition or enforcement of a foreign judgment in the Republic of Lithuania is incompatible with its legal system and contrary to fundamental principles of law. In such cases, the risk must arise from manifest infringement of a rule of law which is considered to be fundamental in the legal system of the state in which the recognition and enforcement of the foreign judgment is questioned or which is considered to be fundamental in that legal system [12]. The term "public order" shall be construed as including international public policy, which includes fundamental principles of due process as well as mandatory rules of law which establish fundamental and universally recognised principles of law [13].

As a result, not every objection (even to mandatory legal norms of the Republic of Lithuania) may be a sufficient ground for non-recognition of a foreign court decision. Cases where it is established that recognition and enforcement of a judgment of a foreign state would be in conflict with the basic principles of law and moral norms established at

the international level established by the Constitution of the Republic of Lithuania shall be recognised as a violation of public order [14]. The purpose of public order is to protect the basic, fundamental interests of the state and society, i.e., the concept of public policy includes the basic principles on which the legal system of the state, the functioning of the state and society are based [15].

At doctrinal and international levels, distinction is made between procedural and material public order. The latter is rarely applied in practice because of the clear prohibition in the EU law governing the recognition and enforcement of judgments on reviewing the correct application and interpretation of the law by a court of another Member State and on the merits of the substance of the dispute. Thus, the fact that a national court deciding on the non-recognition of a judgment has applied a different rule of law or resolved a dispute between individuals in a different way is not a sufficient ground for not recognising a judgment given in another Member State. The fundamental problem with the substantive public policy clause, however, is its relationship to morality. It is generally argued that fundamental principles of morality can be attributed to a substantive public policy clause; however, the content of public order, and morality in particular, is so vague and varied that their application requires special attention. Unjustified refusal to recognise a judgment given in another Member State may undermine protection of the individual right of such a person and the effectiveness of the right to a fair trial. Also, unreasonable refusal of a person's request to refuse to recognise and enforce such a decision may deny sovereignty of the state recognising the decision, the constitutional order or the moral norms recognised and respected in that society.

On the other hand, giving national courts the power to interpret the content of public policy exclusively could, in principle, jeopardize one of the European Union key objectives of creating a European market based on mutual trust between Member States and simplifying recognition and enforcement of foreign judgments by abolishing formalities and ensuring their free movement. Therefore, although discretion to interpret the concept of public policy is vested in the courts of the Member States, i. e. Member States are free to determine the content of the concept of public policy, interpretation of the limits of this concept is a matter for the CJEU. By refusing to recognise and enforce a judgment given in another Member State, national courts are free to identify the rules which are to be regarded as part of public policy in a given Member State, but whether those rules are in fact equivalent to public policy (where a reference is made by a national court), decided by the CJEU.

However, the authors discuss whether inclusion in the CJEU of the limits on the interpretation of the public order clause is a sufficient guarantee to ensure proper application of the public order clause, given that obligation to refer a question to the CJEU is limited to the court seized. Flexibility and uncertainty of the public policy clause raises the issue of ensuring uniform interpretation and application of the clause, as the EU law rules (other than a reference to the CJEU by a court of origin) do not provide for other measures to ensure effective exercise of their right to a fair trial.

Res judicata Principle in EU

The principle of *res judicata* means that an adjudicated issue cannot be re-litigated (Minssen and Groussot, 2007). The effect of applying the principle of *res judicata* is manifested in two aspects: the negative and the positive. The negative effect of the principle of *res judicata* is that the parties cannot re-bring an identical action (*non bis in idem*), while the positive effect of the principle of *res judicata* is that the judgment can be used as a basis for a claim in another civil case, i.e., the judgment acquires a preliminary ruling and the findings of fact cannot be challenged by the parties in other cases (Mikelėnas, 1997).

The EU principle of *res judicata*, which is applied directly in a domestic court of a member state when dealing with a dispute falling within the scope of EU law, has a number of strands. One is known as relative *res judicata* and is applied where a second action is brought between the same parties, dealing with the same subject matter and based on the same grounds as an earlier action. However, this case concerns a distinct strand known as absolute *res judicata* or, to use its full Latin tag, *res judicata erga omnes*. This is intended to convey that, where the principle applies, a judicial decision is given dispositive effect which is binding not simply on the parties to the decision but on everyone.

Analysing the effects of *res judicata*, it is important to consider one CJEU case dealing with the question whether a court in the Member State addressed is bound by the circumstances of a foreign judgment where the court of origin refused to hear a dispute under an agreement conferring jurisdiction. The Court stated in case *Gothaer Allgemeine Versicherung AG* that since a court of the Member State of origin had recognised the validity of such a jurisdiction clause in reviewing its jurisdiction, it would be contrary to the principle of mutual trust in administration of justice in the European Union of the court of requested Member State. The Court also noted that a judgment of a court of a Member State, declaring that it has no jurisdiction on the ground that the clause is valid, is binding on the courts of other Member States as regards the conclusion reached in the operative part of the judgment. Lack of jurisdiction of that court and the conclusion as to the validity of that condition are the grounds of that judgment, which are necessary for adoption of the operative part of the judgment. In such circumstances, it is recognised that the court seized a judgment in which a court of another Member State has declared that it has no jurisdiction to rule on the substance of the dispute and is bound by the statement of reasons in the judgment declaring the action inadmissible on the validity of that condition.

Thus, discussing recognition and enforcement of foreign judgments, the question arises whether the judgment of a Member State, refusing to recognize a judgment given in another Member State in a decision on procedural irregularities in proceedings in the State of origin, has the *res judicata* effect in another Member State.

In the perspective of the current research, judgment of a court of a Member State refusing to recognise a judgment given in another Member State by a court of another Member State *per se* shall not have the force of *res judicata* in another Member State. This

conclusion must be drawn in the light of possible differences in public policy between the Member States. However, a court of another Member State should consider infringements found in another Member State by the court of the State of origin and assess whether such an infringement is contrary to public policy in that Member State.

Conclusions

Application of a public policy clause in the European Union law in civil matters is not uniform. Interpretation and application of the public policy clause is also left to the courts of the Member States, but this does not guarantee uniform implementation of the principle of free movement of judgments in the EU.

A judgment of a court of a Member State refusing to recognise a judgment given in another Member State by a court of another Member State *per se* shall not have the force of *res judicata* in another Member State due to differences of public order among the Member States. However, infringements found by one Member State court should be considered by another Member State, evaluating it according to the public order of the respective Member State.

Bibliography

1. Decision of the CJEU in case *Régie nationale des usines Renault SA vs Maxicar SpA ir Orazio Formento*, case C-38/98. https://curia.europa.eu/juris/liste.jsf?language=en&num=C-38/98
2. Decision of the CJEU in case *Yvonne Van Duyn vs Home Office*, case 41/74. https://curia.europa.eu/juris/showPdf.jsf?docid=88751&doclang=EN
3. Decision of the ECHR in case *Gnahoré vs France,* application No. 40031/98. http://hudoc.echr.coe.int/eng?i=001-58802
4. Decision of the ECHR in case *Hornsby vs Greece*, application No. 18357/91. http://hudoc.echr.coe.int/eng?i=001-58020
5. Decision of the ECHR in case *Karrer vs Romania*, application No. 16965/10. http://hudoc.echr.coe.int/eng?i=001-109191
6. Decision of the ECHR in case *Négrépontis-Giannisis vs Greece*, application No. 56759/08. http://hudoc.echr.coe.int/eng?i=001-138592
7. Jokubauskas, R., et al. (2020). *Užsienio teismų sprendimų pripažinimas ir leidimas vykdyti Lietuvos Respublikoje* (Eng. *Recognition and Permission to Enforce Judgments of Foreign Courts in the Republic of Lithuania*). Vilnius: Mykolo Romerio Universitetas. https://repository.mruni.eu/handle/007/17119
8. Kaye, P. (1987). *Civil Jurisdiction and Enforcement of Foreign Judgments*. Professional Books Ltd.
9. Kirkutis, M., Jokubauskas, R. (2020). Viešosios tvarkos pažeidimas kaip užsienio teismų sprendimų nepripažinimo pagrindas Lietuvos teismų praktikoje (Eng. Violation of public order as basis for non-recognition of foreign court decisions in practice of Lithuanian courts). *Jurisprudence. 27(1)*, pp. 187–201. https://ojs.mruni.eu/ojs/jurisprudence/article/view/5728/4907
10. Mikelėnas, V. (1997). *Civilinis procesas*. II dalis (Eng. *Civil process*. Part II). Vilnius: Justitia.

11. Minehan, K. E. (1996). The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis. *Loyola of Los Angeles International and Comparative Law Review*. Pp. 795–796. https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1399&context=ilr
12. Minssen, T., Groussot, X. (2007). Res Judicata in the ECJ Case Law: Balancing Legal Certainty with Legality? *European Constitutional Law Review*. Pp. 385–418. https://www.researchgate.net/publication/43233749_Res_Judicata_in_the_ECJ_Case_Law_Balancing_Legal_Certainty_with_Legality
13. Rijavec, V., et al. (2018). *Remedies Concerning Enforcement of Foreign. Brussels I Recast*. The Netherlands: Wolters Kluwer.
14. Stauskienė, E. (2007). Teisinė vykdymo proceso prigimtis (Eng. Legal nature of the enforcement process. *Jurisprudence. 1(91)*, p. 72. https://ojs.mruni.eu/ojs/jurisprudence/article/view/2777/2581
15. The ruling of the Appeal Court of Lithuania in civil case No. 2T-49/2013. http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=fb34c2c5-fb12-46d4-81a3-6296cb6c905e
16. The ruling of the Supreme Court of Lithuania in civil case No. 3K-7-179/2006. http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=4c847bef-9079-4ae6-8086-f7c22eb6ff5f
17. The ruling of the Supreme Court of Lithuania in civil case No. 3K-3-443/2008. http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=3a214220-95e6-474a-8707-c0703ae3e6ec
18. The ruling of the Supreme Court of Lithuania in civil case No. 3K-3-434/2006. http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=f16f8a56-77ca-45a3-b969-0879d73013b1